86-626

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN THE MATTER OF KATHY G.J. (ANONYMOUS),

Petitioner,

vs.

ARNOLD D. (ANONYMOUS),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be denied where the Decision and Order of New York's Appellate Division: Second Department rests on an adequate state ground and because, in any event, petitioner's claims do not involve issues of public interest or a conflict between two Circuit Courts?

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STATEMENT OF THE CASE

A. The Facts.

The non-marital child was born October 23, 1976. Petitioner's application for an order of filiation was initiated in the New York State Family Court: Queens County in October, 1977. A May 22, 1980 Decision and Order of Family Court Judge Bruce M. Kaplan declared respondent to be the father. The finding of paternity was subsequently affirmed by the New York Appellate Division: Second Department. The said May 22, 1980 Decision and Order also fixed temporary child support at $100.00 per week.

In June and July of 1983 a ten day trial was conducted before Judge Bruce M. Kaplan to fix the amount of permanent child support. The June 7, 1984 Decision and Order of Judge Bruce M.

Kaplan and his separate June 25, 1984 Order (A*26a-30a) found, among other things, that the fair and reasonable sum for weekly child support was $257.00; directed that respondent pay 95% thereof or $244.15 per week; and directed that said $244.15 per week be paid retroactive to June 13, 1982.

B. The Family Court June 7, 1984 Decision and Order.

The June 7, 1984 Decision and Order rejected all claims of petitioner as to non-constitutionality (A31a-32a).

C. The Appellate Division: Second Department Decision and Order.

A unanimous April 7, 1986 Opinion and April 7, 1986 Order of the Appellate Division: Second Department affirmed the

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* References to the Appendix to the Petition herein are indicated by the prefix "A".

Decision and Order and separate Order of Judge Kaplan except as to certain modifications not relevant hereto, to wit, requiring the weekly sum of $257.00 to be paid in full by respondent and requiring payment of said weekly sum to be retroactive to October 8, 1977 (A3a-25a).

The unanimous court rejected petitioner's constitutional claims. Presiding Justice Niehoff, speaking for the unanimous Appellate Division, compared New York Family Court Act Section 413, concerning parental support of marital children, with New York Family Court Act Sections 513 and 545, concerning support of non-marital children (A8a-9a). Justice Niehoff reached the constitutional issue by holding that the two statutes were ". . . substantially the same" and that the "The only potentially

significant difference between them is the reference in Family Court Act Section 413 to the marital standard of living . . ." (Alla). Justice Niehoff explained the difference by stating:

> "The reason for this distinction is an important, valid and constitutional one. Using the marital standard of living as a guidepost in determining a marital child's support decreases the possibility that such a child will have to face the additional trauma of adjusting to a new standard of living, while adjusting to all of the other changes and engendered by a breakup of a marriage." (Alla).

Justice Niehoff then held that all that is required is that ". . . a fair balance must be struck taking into consideration all relevant circumstances." and that the cited Family Court Act sections seek to achieve the same end which is ". . . to provide for the needs of a particular child, whether marital or non-marital, according to the

circumstances of the parents and the child."(A14a). Justice Niehoff dismissed the claim of non-constitutionality by stating:

> "Simply because another child of the same father, in different circumstances, receives more support, does not mean that equal protection has been denied by the statutes; it only means that the relevant circumstances differ." (A14a).

D. The Court of Appeals Order.

By a July 3, 1986 Order the New York Court of Appeals denied petitioner's application for leave to appeal from the said April 7, 1986 Appellate Division Order (A1a-2a) on the ground that the Order sought to be appealed from did not finally determine the paternity proceeding.

ARGUMENT

A. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT RESTS ON AN ADEQUATE STATE GROUND.

Certiorari should be denied because there is an adequate state ground for the decision of the New York Court of Appeals which precludes this Court's review. Florida v. Casal, 462 U.S. 637, 103 S.Ct. 3100 (1983); Wilson v. Loew's Inc., 355 U.S. 597 (1958); Herb v. Pitcairn, 324 U.S. 117, 125-6 (1945).

Justice Niehoff, speaking for the unanimous Appellate Division, found that, in any event, constitutionality aside, the needs of the child had been fully met and that Judge Kaplan had ". . . demonstrated a thoughtful concern for the welfare of the child" (A7a); that the Decision of Judge Kaplan ". . . provided for her support according to

her . . . 'needs', while keeping in mind her father's ability to pay." (A15a). Judge Niehoff also pointed out the statement by Judge Kaplan in his Decision that support for the child was ". . . not diminished by as much as a penny because Respondent is presently supporting his 4 marital children" (A16a) and the further statement of Judge Kaplan that the child ". . . will receive a level of support that more than meets a level that is fair and reasonable." (A16a).

B. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS PRESENTED NO FEDERAL CONSTITUTIONAL QUESTION MERITING REVIEW.

The case does not, in any event, present any federal constitutional question meriting review. See Cichos v. Indiana, 385 U.S. 76, 80 (1966); Rice v. Sioux City Cemetery, 349 U.S. 70, 78n.2

(1955); McCullough v. Kammerer Corp., 323 U.S. 327, 238-9 (1945); United States v. Rimer, 220 U.S. 547, 548 (1911).

C. CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION FOR WRIT OF CERTIORARI DESIGNATES THE NEW YORK STATE COURT OF APPEALS AS THE COURT TO WHICH THE WRIT SHOULD BE DIRECTED BUT ONLY SEEKS REVIEW OF THE APRIL 7, 1986 ORDER OF THE NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT.

Certiorari must be denied since the New York Court of Appeals is the court to which the writ is directed. The July 3, 1986 Order of the New York Court of Appeals (A1a-2a) merely denied petitioner's application for leave to appeal from the April 7, 1986 Order of the New York Appellate Division. The petition for the writ is directed to the merits of said April 7, 1986 Order of the Appellate Division which is the highest

court of New York that actually ruled on the merits. The July 3, 1986 Order of the Court of Appeals presents no issues to which the petition for a writ is addressed. Certiorari is foreclosed by virtue of the fact that review is available only from a final judgment of the highest court of New York in which a decision could be had and in this instance that court is the Appellate Division and not the Court of Appeals, 28 U.S.C.A. Sec. 1257.

CONCLUSION

CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
November 17, 1986

Respectfully submitted,

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